STATE OF MICHIGAN

COURT OF APPEALS

DENNIS GOODMAN,

Plaintiff-Appellant,

v

GENESEE COUNTY,

Defendant-Appellee.

UNPUBLISHED
August 8, 2006

No. 266955
Genesee Circuit Court
LC No. 04-080516-CD

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this action alleging violations of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. Plaintiff also challenges a protective order prohibiting certain discovery. We affirm in part, reverse in part, and remand for further proceedings.

I. Basic Facts and Procedural History

Plaintiff served as defendant's Motor Pool Administrator but was discharged from his position after the motor pool division was reorganized in a manner that eliminated his position and rendered him ineligible for continued employment within the division. He thereafter filed the instant suit for damages, claiming that the reorganization plan resulting in his discharge was the unlawful product of a combination of racial discrimination and retaliation for his complaints of discrimination and reports to the Department of Environmental Quality (DEQ). However, after concluding that plaintiff had failed to create any genuine issues of material fact to support these claims, the trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). This appeal followed.

II. Analysis

We review a trial court's decision on a motion for summary disposition de novo. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party,

leaves open an issue upon which reasonable minds could differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A. Racial Discrimination under the ELCRA

In support of his claim of racial discrimination, plaintiff asserts that his African-American supervisor, Eric Hopson, intentionally caused plaintiff's position to be eliminated because plaintiff is Caucasian. The ELCRA prohibits employers from discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a). Plaintiff correctly notes that different standards of proof are applied to determine whether a discriminatory treatment claim may proceed to the fact-finder based on the type of evidence of discrimination that a plaintiff provides. He claims that racial comments made by Hopson constitute "ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999). Accordingly, he argues that he has provided direct evidence of intentional, race-based discrimination, rather than merely alleging "circumstances giving rise to an inference of discrimination." *Id*. at 359. Therefore, he argues that his prima facie case should not be evaluated using the burden-shifting analysis enunciated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which explicitly requires a plaintiff to prove that the defendant's proffered legitimate reasons for its adverse action are merely pretextual. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001); *Wilcoxon*, *supra* at 359-360. We agree.

Claims that present direct evidence of racial animus are commonly referred to as "mixed motive" or "intentional discrimination" claims. *Wilcoxon*, *supra* at 360. In such cases, the plaintiff must show: (1) that he is a member of a protected class, (2) an adverse employment action, (3) that the employer was predisposed to discriminating against members of the plaintiff's protected class, and (4) that the employer actually acted on that predisposition in visiting the adverse employment action on the plaintiff. *Id*. at 360-361. When a plaintiff has provided direct evidence of discrimination, it is generally the job of the fact-finder to weigh the parties' evidence concerning the defendant's motivation, the meaning of apparently discriminatory remarks, or the credibility of evidence. *DeBrow*, *supra* at 539-540. A defendant may, however, avoid a finding of liability by showing that it would have made the same decision even without consideration of the protected characteristic. *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 Mich 679 (1997).

Here, the parties contest whether plaintiff has created a genuine issue of material fact regarding whether defendant may be said to have been predisposed to discriminating, and to have acted on the predisposition, in choosing to reorganize the motor pool and eliminate plaintiff's position in the process. Plaintiff focuses his argument on an e-mail message that he alleges was sent to him by Hopson on the day before the September 28, 2004 meeting at which defendant's board of commissioners voted to adopt a budget that, among other things, eliminated plaintiff's position. In addition to requesting motor pool fleet information from Goodman, this e-mail states: "[B]eing white and so autonomous in your position for so many years, I bet you think the board will listen to you tomorrow. You'll find out different, they listen to me now. [¶]

You people seem to think you can get away with anything but things have changed around here now."[1]

Plaintiff compares this comment to the facts of *DeBrow*, *supra* at 538, in which the plaintiff was fired during a conversation in which his supervisor said that the plaintiff was "getting too old for this shit." There, the Court concluded that the trial court improperly dismissed the plaintiff's age discrimination claim because,

> [w]hile a factfinder might be convinced by other evidence regarding the circumstances of the plaintiff's removal that it was not motivated in any part by the plaintiff's age and that the facially incriminating remark was no more than an expression of sympathy, such weighing of evidence is for the factfinder, not for this Court in reviewing a grant of a motion for summary disposition. [*Id*. at 539.]

We agree that Hopson's e-mail message, when viewed in a light most favorable to plaintiff, provides direct evidence of animus that is comparable to the statement in *DeBrow*. The e-mail message refers to plaintiff's race and, simultaneously, clearly refers to the board's upcoming vote on whether to eliminate plaintiff's position and Hopson's intent to influence the board. These remarks constitute "ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action." *Wilcoxon*, *supra* at 360.

The trial court acknowledged this direct evidence of discrimination, but incorrectly concluded that this evidence was essentially irrelevant given that it was the board, and not Hopson, that ultimately decided to eliminate plaintiff's position. Regardless that a decision may be made by a potentially unbiased final decision-maker, racially-motivated input into the decision-making process may still provide direct evidence of discrimination. For instance, we note *Harrison*, *supra* at 608 n 7, in which this Court concluded that racially biased comments made to the employee who made a final hiring decision by other employees participating in the interview process "must be imputed" to the decision-maker for purposes of a motion for summary disposition brought under MCR 2.116(C)(10). There, because the decision-maker testified in his deposition that he had consulted with and considered the views of another employee who exhibited racial animus during the decision-making process, the plaintiff was found to have raised a genuine issue of material fact regarding whether the decision "was influenced by a person that plaintiff alleges operated with racial animus." *Id*. The discriminatory comments were not considered mere "stray remarks" of non-decision-makers. *Id*.

Here, similarly, the board appears to have received substantial input from Hopson. As defendant's Director of Purchasing, Hopson reviewed an initial reorganization assessment that was provided by an independent contractor. Hopson then provided his own plan recommendations to the board through a memorandum, a presentation to the Finance/Budget

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[1] Although Hopson denies that the e-mail message as sent by him to plaintiff contained these statements, and in support of that claim has produced a copy of the e-mail message that contains only the request for motor pool fleet information, for purposes of our review we must view the evidence presented in a light most favorable to plaintiff. *West*, *supra*.

Committee, and in meetings with board chairperson Richard Hammel. Indeed, Hammel attested that when plaintiff presented him with materials challenging the prudence of the reorganization plan, Hammel did not review the materials because he was satisfied with Hopson's recommendations.

We reject defendant's argument that Hopson's input was essentially irrelevant because the initial assessment provided by the independent contractor also eliminated plaintiff's position. Rather, we find that plaintiff has created a genuine issue of material fact regarding whether he would have remained eligible for employment if the initial assessment had been adopted. As indicated below, the initial assessment recommended the elimination of plaintiff's position as well as the creation of two new positions:

> We also recommend that the county create a new position of Fleet Manager to centralize the management of the day to day activities of fleet maintenance operations and motor pool activities. This position should have first hand experience with fleet maintenance as well as with vehicle procurement, daily rental motor pool activities, computerized fleet management applications, and customer service. This position should also be capable of assisting with hands on fleet maintenance activities during vacations and times of peak workloads.
>
> Motor pool activities should [be] handled by a new position with the title of Fleet Operations Assistant. The current Motor Pool Administrator position should be eliminated. This position is at a level that is higher than is required for motor pool operations and the job description is not suitable for the new Fleet Manager position. The Fleet Operations Assistant position, in addition to dispatching pool vehicles, should also function as the parts technician and procurement assistant for maintenance operations so that the mechanics can devote all of their time to repair activities.

Defendant argues that each of these two positions required the ability to perform basic mechanic services—and therefore required mechanics' certification—because the position descriptions require the capability "of assisting with hands on fleet maintenance" and functioning "as the parts technician and procurement assistant for maintenance operations." Accordingly, because plaintiff is not a certified mechanic, defendant argues that he would have become ineligible for employment regardless of whether Hopson provided his alternative plan for reorganization.

However, there is no evidence that these positions would have required mechanics' certification. To the contrary, these positions are distinguished from those of "the mechanics" in the assessment and, significantly, the Fleet Operations Assistant position appears designed to replace plaintiff's former position. With regard to specific functions, Hopson testified that plaintiff's former position included "maintaining parts, supplying parts, procuring parts or inventorying parts." Plaintiff also provided his own testimony and affidavit explaining his qualifications, along with the Vehicle/Car Pool Administrator job description and a list of activities he performed that were not included in the job description. His former position "[d]irect[ed] the operation" of the motor pool and required knowledge of computerized systems, procurement, fleet operations, maintenance and repair, among other requirements and duties. Plaintiff's list of additional duties also included maintenance activities such as adjusting brakes, assisting with installations, replacing and adjusting headlights, taillights and tires, and "picking

up the slack on minor items during mechanic absences." These duties appear substantially similar to the duties listed in both of the new positions proposed by the assessment and, particularly, appear very similar to the duties of the Fleet Operations Assistant. At a minimum, there exists a genuine issue of fact regarding whether plaintiff would have been qualified for the Fleet Operations Assistant position.

Therefore, plaintiff has created a genuine issue of fact regarding whether his total ineligibility for employment was caused by Hopson's plan. Hopson's plan eliminated plaintiff's position but transferred his managerial duties to a supervising mechanic position; all of the positions that existed after Hopson's reorganization explicitly required mechanics' certification. Plaintiff also provided evidence that African-Americans remained eligible for employment with the motor pool and that an African-American was hired for the new mechanic position created by Hopson's plan. Accordingly, Hopson's level of input into the board's eventual decision is relevant to whether plaintiff's loss of employment was substantially caused by Hopson's alleged discriminatory motives.

We reiterate that summary disposition is not proper here, where there is direct evidence of discrimination, merely because the board is not charged with animus and because defendant has provided significant evidence of its legitimate reasons for adopting Hopson's plan. Rather, because plaintiff has provided factual support for his argument that Hopson provided the primary input into the board's decision, this case is not distinguishable, for instance, from more typical cases in which a supervisor makes a racially motivated decision that is automatically sanctioned and carried out by the defendant organization, which may then be liable based on respondeat superior. If a person who is improperly motivated gives significant input into a decision—even if his or her input is phrased innocently—such biased input may meet the plaintiff's burden to show that animus was "a 'substantial' or 'motivating' factor" in the eventual decision. *Harrison*, *supra* at 611. In cases where a plaintiff has provided direct evidence of discrimination, we must leave it to the fact-finder to consider the meaning of the apparently discriminatory remarks and to weigh the evidence of discrimination against the evidence supporting the defendant's claim that it would have reached the same decision without consideration of the plaintiff's race. *DeBrow*, *supra* at 539-540; *Harrison*, *supra* at 613. The trial court erred by dismissing plaintiff's racial discrimination claim merely because the board was the ultimate decision-maker. Remand is warranted for this reason.

B. Retaliation under the ELCRA and WPA

The trial court, however, properly dismissed plaintiff's claims of retaliation under both the ELCRA and the WPA. With regard to his claim for retaliation under the ELCRA, plaintiff has not provided evidence of a causal connection between defendant's awareness of plaintiff's complaints of racial discrimination and defendant's decision to adopt a reorganization plan that rendered plaintiff ineligible for employment. The ELCRA prohibits retaliation or discrimination "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the ELCRA]." MCL 37.2701(a). To establish a prima facie claim of retaliation under the ELCRA, a plaintiff must show "'(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.'" *Garg v Macomb Co Community Mental Health*

Services, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

We initially note that it is somewhat unclear whether plaintiff engaged in a protected activity at any time before the September 28, 2004 board meeting. It appears that prior to the meeting plaintiff informed Robert Gorman, his union representative, that Hopson had made racial remarks on two occasions when Hopson was subjecting plaintiff to what plaintiff concluded was harassing or discriminatory treatment. Plaintiff also vaguely recounts a meeting with Renita Coney, defendant's Affirmative Action Director, during which plaintiff complained that he was treated differently from other employees, but stated that he had "no way of knowing" whether the harassment was racially motivated. Finally, the packet of materials that plaintiff claims to have supplied to the board before its September 28, 2004 meeting includes an outline that appears to refer to Hopson in stating, "Has made unwarranted racial comments and statements in response to [plaintiff's] time requests."

Plaintiff's argument that defendant had relevant knowledge of these reports of discrimination are somewhat difficult to analyze because he fails to make clear whether he asserts that Hopson, the board, or both retaliated against him. With regard to the board, there is no evidence that the board was made aware of plaintiff's race-related complaints until either the September 28, 2004 meeting or the time it received plaintiff's materials in preparation for the meeting. Regardless, the board's mere knowledge of Hopson's remarks is not sufficient evidence that their awareness caused plaintiff's retaliatory discharge. In order to establish the causation element, "'[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.'" *Garg*, *supra* at 286, quoting *West*, *supra* at 186. Plaintiff has not provided any additional evidence that the board adopted Hopson's plan in retaliation for plaintiff's report of Hopson's racial remarks.

Plaintiff's arguments also implicate Hopson's awareness of plaintiff's complaints, and perhaps rightly so. Although plaintiff presents no authority directly addressing this point in the context of a claim for retaliation, Hopson's awareness of plaintiff's complaints, and potential retaliation therefore, is arguably relevant to defendant's liability given that Hopson had substantial influence in the board's decision-making process. See, e.g., *Harrison*, *supra*. Regardless, his claim in this regard cannot succeed because there is no evidence that Hopson was aware that plaintiff engaged in a protected activity. There is no evidence that Hopson was aware of the reports to Gorman or Coney. Most strikingly, there is no evidence that complaints of *racial* discrimination were raised at the meeting among plaintiff, Gorman, and Hopson on January 30, 2004, when Hopson allegedly threatened, "I will never be in a position where I have to prove that I'm not harassing you." Rather, Gorman's affidavit indicates that at this meeting plaintiff complained of generally harassing treatment in violation of the collective bargaining agreement in the form of Hopson's arguably unfair treatment and disciplining of plaintiff. Moreover, the evidence does not show that Hopson was made aware of plaintiff's race-related complaints at the September 28, 2004 board meeting. Plaintiff does not claim that Hopson received plaintiff's packet of materials, and the minutes of the meeting do not suggest that plaintiff addressed race-related issues during his remarks. Regardless, even if Hopson did become aware of plaintiff's complaints at the meeting, the evidence does not create an inference of causation, as Hopson made his initial plan recommendations as early as September 13, 2004. Accordingly, plaintiff has not provided evidence that any knowledge that Hopson or the board

had of his race-related complaints was causally connected to his discharge. His retaliation claim under the ELCRA was properly dismissed for this reason.

Plaintiff's claim under the WPA fails for similar reasons. The WPA protects an employee who has reported or is about to report a suspected violation of state or federal law, regulation or rule from adverse employment actions. MCL 15.362; see also *West*, *supra* at 183. To establish a prima facie case under the WPA, a plaintiff must show that "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West*, *supra* at 183-184.

Here, the parties contest whether plaintiff's evidence established genuine issues of material fact concerning the first and third elements of a prima facie case. With regard to the first element, plaintiff claims that he engaged in protected activity in one or both of two ways. Primarily, he recounts a call that he placed to the DEQ after learning that defendant was considering closing the motor pool and using the facility grounds as a parking lot. Plaintiff had become concerned about DEQ regulations that would require particular treatment or cleanup of the facility's fuel storage tanks. He averred that he told the DEQ "what we had and what the board was talking about in closing it and just making the whole area into a parking facility." It is questionable whether this conversation constitutes a report of a violation of a law or regulation, particularly in light of plaintiff's admission that no agent of defendant ever specifically told him that defendant intended not to follow DEQ regulations concerning the fuel tanks. Nonetheless, when the testimony is viewed in a light most favorable to plaintiff, the DEQ's alleged response, i.e., "No, this can't happen like that," arguably implies that plaintiff had suggested that cleanup procedures would not be followed.

On appeal, plaintiff adds that "all complaints [he] made to higher authorities within [defendant]" also constituted protected activity because his complaints were reports "to a larger umbrella entity that is also a public body." Although, as a general matter, such a report constitutes a report to a public body within the meaning of the WPA, *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 496; 705 NW2d 689 (2005), we can only surmise that plaintiff is referring first to the October 28, 2003 memorandum given by him to union representative Mark Pratt and to Hammel, and which he claims he also provided to the board. However, while this memorandum explains DEQ requirements for cleanup, it does not mention his call to the DEQ or his suspicion that procedures would not be followed. Second, plaintiff sent an e-mail message to Hammel and "all users" within the county on April 3, 2003, which he also claims he provided to the board. This message, however, explains the drawbacks of closing the facility—including the cleanup that would be required—but does not mention the DEQ or plaintiff's suspicion that regulations would not be followed. Accordingly, we conclude that only plaintiff's call to the DEQ has the potential to be construed as a report of a violation.

With respect to this call, defendant argues that a reported suspicion that defendant would violate the law *in the future* is not protected by the act and, therefore, that plaintiff may not be said to have engaged in protected activity, at all. We decline to address defendant's alternative argument because we find that the trial court properly dismissed plaintiff's claim based on its conclusion that there was no causal connection between plaintiff's call to the DEQ and defendant's decision to eliminate plaintiff's position.

The only evidence that defendant was aware of plaintiff's call to the DEQ is plaintiff's testimony that he told Hammel that he had contacted the DEQ when he met with Hammel on October 30, 2003. Plaintiff claims Hammel responded: "I wish you had waited." He does not provide any evidence that links his alleged protected activity with his eventual discharge beyond Hammel's response and the fact that the elimination of plaintiff's position occurred in September 2004. Plaintiff merely states in his brief that causation is evident "[b]ecause the timing is so suspicious in this case." However, this is insufficient to establish causation and, therefore, to present a prima facie case under the WPA. Regardless that the elapsed time-period of nearly a year may not prevent a showing of causation according to the cases cited by plaintiff, these cases also clearly require more than merely proof that the adverse action occurred after the protected activity. For instance, plaintiff cites *Harrison v Metropolitan Government of Nashville*, 80 F3d 1107 (CA 6, 1996), overruled in part on other grounds *Jackson v Quanex Corp*, 191 F3d 647, 667 n 6 (CA 6, 1999). There, the discharge occurred at most one year and three months after a complaint was filed. *Id*. at 1119. However, causation was established not merely by the timetable, but by the timetable combined with other factors including that three employees feared retaliation because the employer had made "repeated comments that suggested he would not hesitate to run employees out of his department." *Id*.

We find this case comparable to *Feick v Monroe Co*, 229 Mich App 335; 582 NW2d 207 (1998), which was a retaliation case brought under the ELCRA. Hammel's comment is comparable to the evidence in *Feick* that the plaintiff's superior "was not pleased" that the plaintiff had filed an Equal Employment Opportunity Commission complaint. *Id*. at 344. The supervisor had also "talked about the complaint to one other person." *Id*. Regardless, that evidence, without more, was held to be insufficient to create a genuine issue of material fact regarding whether the adverse action was caused by retaliation. *Id*. at 344-345. Accordingly, the trial court properly dismissed plaintiff's WPA claim because of the lack of evidence of a retaliatory causal link between plaintiff's report and his eventual discharge.

C. Protective Order

Finally, we address plaintiff's argument that the trial court abused its discretion when it limited plaintiff's deposition of Hammel and prohibited plaintiff from deposing the remaining members of defendant's board of commissioners. We review a trial court's decision whether to grant a protective order for an abuse of discretion. *Charter Twp of Bloomfield v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002).

The order at issue here reads, in pertinent part, as follows:

> Plaintiff is precluded from inquiring into the motivation and/or understanding of any individual Commissioner concerning any vote that was taken in association with the September 28, 2004 meeting of the Genesee County Board of Commissioners or any meeting of the Commissioners leading up to that September 28, 2004 meeting vote.

We find no abuse of discretion in the trial court's entry of this order. Although parties are permitted to obtain all relevant, nonprivileged information through the discovery process, MCR 2.302(B)(1), the judiciary generally may not interfere with a legislative decision-making process by allowing inquiry into the thought processes of legislative officials. See *Sheffield Dev*

Co v City of Troy, 99 Mich App 527, 533; 298 NW2d 23 (1980) ("[t]he collective or individual motives of a legislative body are not discoverable"). Consistent with this rule, and as conceded by defendant on appeal, the order at issue here does not preclude the deposing of individual board members, but merely inquiry by plaintiff into the motivations and understandings of the members regarding adoption of the reorganization plan. To that extent, and insofar as the order does not preclude other relevant inquiry by plaintiff at deposition, the order is wholly appropriate. *Id*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray